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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 696

HARRY H. DRILL, *Petitioner*

v.

UNITED STATES, *Respondent*

On Petition For A Writ Of Certiorari To The United States Court Of Claims

PETITION FOR REHEARING

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PETITION FOR REHEARING

This Petitioner respectfully, timely, and pursuant to Rule 58(2) presents his Petition For a Rehearing of this Court's Order and Notice dated February 18, 1963, denying his Petition For A Writ of Certiorari To The United States Court of Claims, and, in support thereof, shows:

Differences in "views" as to the nature of the jurisdiction of the Court of Claims are substantial grounds for review on certiorari

Petitioner urges as grounds for rehearing, *first*, that the "views" of the Government, the "views" of the Court of

Claims, the "views" of this Petitioner; and the "views" of the Supreme Court differ widely as to the *nature of the jurisdiction* that *may be exercised* by the Court of Claims; and, *second*, that their "views" differ widely on the *nature of the jurisdiction exercised* and the *action taken* by the Court of Claims in the case at bar. These divergent "views" easily remove this case from the mere episodic; present substantial reason for review because the "views" of the Government, partially and presently adopted by the Court of Claims, threaten to deprive countless numbers of Claimants of their "day in court" in claims alleged to be "founded" upon the "Tucker Act", 28 U.S.C. 1491. On the other hand, thorough research establishes that this Supreme Court shares the "views" of this Petitioner as to the *jurisdiction* that *may* be exercised by the Court of Claims, and this Court has repudiated the "views" of the Government and those of the Court of Claims concerning the jurisdictional action taken in the case at bar in well reasoned decisions without reversal or modification. Significantly, this Court is respectfully reminded that the Government, opposing Certiorari, has not cited any authority whatsoever wherein it has been ruled that the Court of Claims is *without jurisdiction* over claims for monetary damages that are "founded" upon the Constitution, or an Act of Congress, or a Regulation of an Executive Department, or upon Contract. No such authority exists! This Court has never itself passed upon a claim for "monetary damages" brought against the United States and alleged to be "founded" upon a provision of the Constitution! However, this Court has repeatedly sustained the *jurisdiction* of the Court of Claims and the District Courts as to claims for monetary damages "founded" upon Acts of Congress and/or Regulations of an Executive Department and/or upon Contract brought against the sovereign United States.

Specifically, this Court ruled that sound reason and substantial grounds for review on Certiorari were present in the case of *United States v. Jones*, 336 U.S. 641; 69 S. Ct. 787 (1949) because the "views" of the Court of Claims, the Government, and the Respondent greatly differed as to the *nature of the jurisdiction* exercised by the Court of Claims and *its action taken*, and the Supreme Court stated at page 792 in that case, viz.:

> "Ordinarily it would be sufficient for us to take the Court of Claims at its word and accept its stated views *of the nature of the jurisdiction it was exerting*. But the *three different views* of its action taken by *itself*, by *the Government*, and by *the Respondent*, together with the difficulty each raise on the record for disposing of the case, *compel us to examine those claims*". (Italics supplied.)

Petitioner respectfully submits that *three differing views* as to the *nature of the jurisdiction that may be exercised* by the Court of Claims and also the nature of the jurisdiction *actually exercised and the action taken* in the case at bar are patently present upon the face of these proceedings for Certiorari without necessity to resort to the Record. Nevertheless, those same differences of view are thoroughly and in detail also disclosed by the Record.

The views of the Government threaten recurrent misleadings of the Court of Claims in the adjudication of the "Tucker Act"

The "views" of the Government as to the jurisdictional powers and authority of the Court of Claims, expressed in this case, pose a continuing threat to recurrently mislead the Court of Claims to deprive Claimants seeking judicial relief under the Tucker Act, 28 U.S.C.A. 1491, of their "day in court". To thoroughly comprehend

such threat, the Court might consider the "Government's views" as it originally expressed them (R. 188-192); nevertheless, those views patently appear in this Certiorari proceedings in substantial detail to warrant rehearing and reconsideration of the Petition for Certiorari. (See Pet. for Certiorari, p. 13)

Particularly, the Government by "Motion To Dismiss" the claims of the verified Petition presented *two* inconsistent and contradictory "views" as to the *nature of the jurisdiction* and the *action* that *may be taken* by the Court of Claims and persuaded that Court to accept such "views", viz: (1) that although that Court *lacks jurisdiction of the subject matters* of a verified Petition, it may, (2), nevertheless, and *without taking* jurisdiction, rule that such verified petition "fails to state a claim upon which relief can be granted"; and it is the Government's further view that the Court may make *both* rulings without necessity for the Government to submit any counter-affidavit *traversing* either "claims of subject matter", or *merits* of the "jurisdictional claims", or the *merits* of the claims for monetary damages set forth in the verified petition. Patently, such "views" threaten and portend ARBITRARY DISMISSAL of *any verified petition*, no matter how meritorious, without a chance to be heard upon the merits, and without joinder of issue, if the Court of Claims continues to accept and share such "views". The Court of Claims does now share such views and so expressed itself by *both* words and action in the case at bar.

The "Views" of the Court of Claims portend recurrent arbitrary withholding of its jurisdiction from claimants seeking relief under the Tucker Act

The Court of Claims, when it drafted its Rule 16(b), specifying that a *selection* must be made of those two (2)

inconsistent defenses, seemed to only *temporarily* recognize that *lack of jurisdiction* PRECLUDES jurisdictional authority to rule that a petition *fails to state a claim upon which relief may be granted.* However, the "views of the Government", despite the objecting and protesting "views of Petitioner", induced the Court to abandon its Rule 16(b), and to accept and share the "views of the Government", and to adopt a *new* and *broader* view of the *nature of its jurisdiction and authority* which permits it, without *jurisdiction over subject matter*, to dismiss ON THE MERITS claims to its jurisdiction alleged to be "founded" as specified in the Tucker Act *and* claims for monetary damages alleged to be "founded" as specified in that Act *without a trial on the merits* and without even a *traversal of those merits* by any counter-affidavit.

The Court of Claims' "views", accepting and sharing the "views of the Government" as to the nature of its jurisdiction, authority, and action to be taken, are substantially expressed in its Order of Dismissal granting the Government's "Motion To Dismiss", (Pet. for Certiorari, App. 9a), and its findings and conclusions expressed therein. Those "views" are, that although the Court *may lack jurisdiction over the subject matter*, claims, causes of action and/or that relief is sought *beyond its jurisdiction*, it may, nevertheless, (and it did), take action to rule that the verified petition *fails to state a* PROPER *cause of action.* Patently, then, the Court sees no inconsistency and no paradox between its *lack* of jurisdiction over the subject matter and its authority to rule on the *merits* of the *same subject matter* although *none* of the "subject matter" of any claim or allegation is traversed or denied by counter-affidavit. Therefore, the failure of the Court to recognize the inconsistency and paradox patent in its own view of the *nature of the jurisdiction*, authority, and *judicial action*

it may exercise, PORTEND repetitious and ARBITRARY dismissal of claims alleged to be "founded" as specified in the Tucker Act. *Any ruling* on the *"merits"* of a claim made by a Court that "LACKS JURISDICTION OF THE SUBJECT MATTER" of those claims *is unquestionably* ARBITRARY! Therefore, the acceptance and grant of such "Motions To Dismiss", based upon such inconsistent and contradictory defenses, threaten recurrent *arbitrary dismissal* of the claims of *any Petitioner* seeking relief under the Tucker Act; hence, those "views" present the same substantial grounds for review on Certiorari as were present in *United States v. Jones,* supra, and are, of course, substantial grounds for rehearing and reconsideration of Certiorari in the case at bar.

The Views of the Petitioner

This Petitioner expressed his differing views as to the *nature of the jurisdiction and the action that may be taken* by the Court of Claims in his "Motion To Strike" the Government's "Motion To Dismiss", (R. 193-200). Moreover, without resort to the Record, the protesting and different "views" of Petitioner substantially appear in his "Petition For Writ of Certiorari" herein, pp. 13-14. It was and is stated by Petitioner that if the Court *lacks jurisdiction of the subject matter* of a verified Petition, then it *lacks jurisdiction and authority* to dismiss the claims for LACK OF MERIT and/or to rule on the *merits* of the claims; that it can only dismiss the Petition for LACK OF JURISDICTION and make no further ruling. It was and is a further "view" of the Petitioner, a view quite different from the views of both the Government and the Court of Claims, that to *traverse the jurisdictional claims* and/or allegations of fact, law, and merits, set forth in a verified petition, the *contravention* of such claims must be made and presented by *counter-affidavit.*

It was and still is a further "view expressed by Petitioner" in the case at bar that for the Government to deny the existence of the Court's jurisdiction over *subject matter* and to simultaneously request the Court *to exersise* NON-EXISTENT *jurisdiction* to rule on the *merits of both fact and law* presents no issue for the Court to decide and is sham and frivolous.

The Government presented a further view threatening the proper Adjudication of Claims filed under the Tucker Act in this Certiorari Proceedings

The Government, refusing to recognize that the defense of *lack of jurisdiction over subject matter* negates and cancels the defense of *failure to state a claim upon which relief can be granted* and/or *failure to state a* PROPER *cause of action* and that the latter defenses negate and cancel the former and that EACH CANCELS THE OTHER, proceeded in its "Opposition Brief" to Certiorari herein (Op. Brf. pp. 6-8), to offer a further and extraordinary "view" on the nature of the jurisdiction and authority of the Court of Claims. The Government argues that when a verified petition is filed alleging the jurisdiction of the Court of Claims and alleging claims and causes of action for monetary damages to be "founded" upon the Constitution *and* upon the Veterans' Preference Act *and* upon CONTRACT, the Court may act as follows, viz: The Court may apply its knowledge of the Constitution, the Veterans' Preference Act, *and the law of contracts* to the alleged claims; then determine that those claims are WITHOUT MERIT; rule that such claims are without merit in law or fact; make such ruling without taking jurisdiction over the *subject matter* of the claims; dismiss those claims; and without having exercised jurisdiction, justify the ruling that the claims, *lacking*

merit in law or fact, are JURISDICTIONALLY DEFECTIVE FOR SUCH CAUSE. Obviously, the Government in its "Opposition Brief" expresses "view" that the *nature of the jurisdiction* of the Court of Claims permit it to determine matters of law, fact, and merit BEFORE taking jurisdiction and without ever taking jurisdiction of the *subject matter* and to dismiss the undenied claims in a verified petition as having been falsely made, or *not founded* as claimed, *not founded upon Contract,* not founded upon either the Constitution *or* an Act of Congress *or* a Regulation of an Executive Department, and/or that such claims existed at common law, and/or that such claims are not necesssarily without merit as *causes of action in some other court* but that they lack JURISDICTIONAL MERIT in the Court of Claims. Further, the Government argues in its "Opposition Brief" herein that the Court of Claims did NOT take jurisdiction over the *merits* of the claims in the case at bar. However, the Court of Claims EXPOSED such "view" and argument to be NOT a view shared by that Court! The Court repudiated the "view" that it had "not taken jurisdiction" and *differed* with the Government. The Order, ruling, "finding" and conclusion of the Court PATENTLY (Pet. App. 9a), in this proceedings on Certiorari disclose that the Court ruled that *"Plaintiff failed to state a* PROPER *cause of action."* Thereby, so ruling, the Court viewed its "jurisdiction and action to be taken" that Plaintiff's causes of action are not justiciable on their *merits* as *"causes of action"* and not merely "jurisdictionally defective" as "viewed by the Government" in its later explanatory "view". Patently, the Court of Claims accepted and followed the views initially and originally expressed by the Government in its "Motion To Dismiss" to the effect that it may rule on the merits of claims without taking jurisdiction and even when it *lacks jurisdiction over*

the subject matter. The Court's use of the word "PROPER" in ". . . *failed to state a* PROPER *cause of action*" reveals that it accepted and adopted the Government's initial and original "view" of its jurisdictional authority. Petitioner respectfully submits that only with "Alice" in "Alice-in-Wonderland" would the word "*proper*" have no relationship to the *merits* of the claims and causes of action. Perhaps with "Alice", where words had no commonly accepted meaning, the words "*failed to state a* PROPER *cause of action*" might have merely meant "*jurisdictionally defective*"? However, in the traditional language of bench and bar, the words "*failed to state a proper cause of action*" mean that the causes of action are without *justiciability in* MERIT, in LAW, FACT, or both, and, in the case at bar, the Court of Claims so ruled and was induced to so rule by the insistent and persuasive "views of the Government" originally presented in its "Motion To Dismiss".

The Views of the Supreme Court

The "views" of both the Government and the Court of Claims that a claim of right to the Court's jurisdiction or any other claim of right may be dismissed on their "merits" without necessity to *traverse* such claims by counter-affidavit, such claims being in a verified petition, are CONTRARY to the "views" and rulings of the Supreme Court expressed in *KVOS v. Associated Press*, 299 U.S. 269, 277-278; 57 S. Ct. 197, and *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178-189, and CONTRARY to the rulings in *Stern v. Beer*, 200 Fed. 2d 794, and *McEldowney v. Card*, 193 F. 475, 483, 485. Therefore, this Supreme Court "views" the *nature of the jurisdiction of the Court of Claims* to be that it MAY NOT question the *merits* or rule on the *merits* of a claim of right to its jurisdiction in a verified petition UNLESS

the Government first *traversed* such claims by counter-affidavit or denial by Answer. As pointed out herein, the Government failed to properly question the *"Jurisdictional Claims"* of this Petitioner!

Further, the "views of the Government" that the *nature of the jurisdiction and authority* of the Court of Claims permits it to apply the LAW OF CONTRACTS to the merits of a claim alleged to be "founded" upon a CONTRACT, and, that, without taking jurisdiction over such claim or *the subject matter* thereof, it may rule that such claims are *without merit* in fact or in CONTRACT LAW and therefor NOT a *"proper"* cause of action, is CONTRARY to the ruling of this Supreme Court expressed in *Bell v. Hood*, 327 U.S. 678; 66 S. Ct. 773. (See Petition For Certiorari, pp. 17; 21-22; and "Response of Petitioner To The Brief For The United States In Opposition To The Petition For a Writ of Certiorari", pp. 4-5.)

Additionally, and further, the "views of the Government", shared by the Court of Claims, that the nature of the jurisdiction and authority of the Court of Claims permits it to apply LAW and FACT to the claims alleged to be "founded" upon specified provisions of the Constitution, Acts of Congress, and Regulations of an Executive Department *without taking jurisdiction over the "subject matter"* of such claims and to rule that such claims are *without merit in law or in fact* and are *not* PROPER *causes of action* and/or existed at common law or belong in some other court, are CONTRARY to the "views" and ruling of this Supreme Court expressed by Mr. Justice Holmes in *United States v. Emery, Bird, Thayer Realty Co.*, 237 U.S. 28; 35 S. Ct. 499; and *Dooley v. United States*, 182 U.S. 222; 21 S. Ct. 762. (Petitioner has pointed out in his Response to the "Opposition of the United

States" in these proceedings, pages 7-9, that this Court ruled in the *Dooley* case, supra, that the jurisdiction of the Court of Claims over the *first class of cases* specified in the Tucker Act has been repeatedly sustained and ruled that even if the claims were *tortious*, the Court of Claims nevertheless had jurisdiction.)

Therefore, it is submitted that the views and decisions of the Supreme Court as to the *nature of the jurisdiction* of the Court of Claims and the *actions it may take* within such jurisdiction are CONTRARY to the "views" of both the Government and the Court of Claims on such subjects; that the Court of Claims may NOT rule on matters of *merit, law, and fact* WITHOUT at least taking JURISDICTION over the *subject matter* BEFORE it considers and applies contract law and/or rules that Plaintiff's causes of action and claims existed at commmon law in law or in fact; and that if the *merits* of allegations of law and fact have not been properly raised by counter-affidavit and denial, the Court of Claims is without basis to question the *merits* of such claims WITHOUT ASSUMING JURISDICTION OVER THE SUBJECT MATTER of those claims; and that the Government in the case at bar moved for dismissal on inconsistent and contradictory grounds and that the Court granted the motion and dismissed the claims on inconsistent and contradictory grounds!

Conclusion

For the foregoing reasons, it seems patently obvious that the "views of the Government", shared by the Court of Claims, PORTEND and THREATEN that sworn allegations claiming the right to the jurisdiction of the Court of Claims and claiming rights conferred by the Tucker Act may be ARBITRARILY dismissed by the Court *on the merits* without that Court ever taking jurisdiction; and

those views further PORTEND and THREATEN to deprive Claimants of their "day in court" and right to be heard on the *merits*. For the Government to present such "views" as to the *nature of the jurisdiction and authority of the Court of Claims;* and for that Court to share such views, such views being contrary to the rulings of this Supreme Court, an important issue as to the future procedures and rulings of the Court of Claims is presented that require the determination and supervision by this Court in order that RECURRENT ARBITRARY DISMISSALS of claims to the relief provided in the Tucker Act will not be made *nor* the precedent in this case followed. (See *United States v. Carlo Bianchi & Co., Inc.*, 83 S. Ct. 321; certiorari granted, Dec. 17, 1962.

Therefore, it is respectfully urged that the Petition For Rehearing be granted, and, that, upon further consideration, Writ of Certiorari issue to the United States Court of Claims.

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Certificate of Counsel

I, Harry H. Drill, Attorney Pro Se for the above named Petitioner, do hereby certify that the foregoing Petition For Rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, Subdivision 2, of the Rules of this Court.

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February 27, 1963.